



## **SPC Task Force on Order 1000**

### **DRAFT 2<sup>nd</sup> REPORT**

**Draft 6/24/2012**

**INTRODUCTION:**

On July 21, 2011, the Federal Energy Regulatory Commission (“FERC”) issued Order 1000. Per the Order, Public utility transmission providers<sup>1</sup> must either amend their open access transmission tariffs (“OATT”) to comply with the requirements of Order No. 1000 or demonstrate how their existing OATT provisions already comply.<sup>2</sup>

In response to Order 1000, the SPP Board of Directors tasked SPP’s Strategic Planning Committee (“SPC”) to lead SPP’s response to the regional policy requirements contained in Order 1000 for a compliance filing. After initial meetings of the SPC to discuss the requirements of Order 1000, the SPC formed the SPC Task Force (“SPCTF”) on Order 1000. As a result, SPCTF was established to examine SPP’s existing OATT to determine whether SPP’s current transmission planning and cost allocation provisions comply with the requirements and whether additional revisions will be necessary. Further the SPCTF on Order 1000 was tasked to propose how SPP should make its compliance filing with FERC.

The members of the SPCTF on Order 1000 were:

<b><u>SPCTF Order 1000 Member</u></b>	<b><u>Organization</u></b>
<b>Mel Perkins, Chairman</b>	<b>Oklahoma Gas &amp; Electric, Co.</b>
<b>Noman Williams, Member</b>	<b>Sunflower Electric Power Corporation</b>
<b>Brian Thumm, Member</b>	<b>ITC Holdings</b>
<b>Dennis Reed, Member</b>	<b>Westar Energy, Inc</b>
<b>Ricky Bittle, Member</b>	<b>Arkansas Electric Cooperatives</b>
<b>Todd Fridley, Member</b>	<b>Kansas City Power &amp; Light Company</b>
<b>Paul Malone, Member</b>	<b>Nebraska Public Power District</b>
<b>Terri Gallup, Member</b>	<b>America Electric Power</b>
<b>Mitch Elmore, Member</b>	<b>Xcel Energy</b>
<b>Michael Desselle, Staff Secretary</b>	<b>SPP Staff</b>

<sup>1</sup> SPP is a Public utility transmission provider.

<sup>2</sup> Order No. 1000 at P 795.

## **COMPLIANCE DEADLINES OF ORDER 1000**

FERC Order 1000 has different filing deadline for Order 1000's Regional and Interregional Requirements as stated below:

Regional Compliance Filing: Compliance filings addressing the Order No. 1000 regional transmission planning and cost allocation requirements must be submitted to FERC by October 11, 2012.

Interregional Compliance Filing: Compliance filings addressing the interregional coordination and cost allocation requirements of Order No. 1000 are due by April 11, 2013.

## **APPROVAL OF FIRST REPORT**

On April 24, 2012, the SPP Board of Directors approved the First Report of the SPCTF. The Report was also approved by the SPC on April 9, 2012. A part of the Report further tasked the SPCTF with the following:

### **2.4 Recommendation on Development of Detailed Transmission Owner Selection Criteria**

The SPCTF recommends the SPCTF develop in detail the evaluation criteria and associated scoring needed to evaluate/compare Qualified Transmission Owners ("QTOs") that are competing to build transmission projects within SPP's footprint. The general process, criteria and scoring is found in Attachment A and B which the SPCTF recommends be further vetted and developed by the SPCTF by June 2012.

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### **3.1 Recommended Transmission Owner Qualification Criteria**

The SPCTF recommends that SPP's compliance filing for Order 1000 contain Transmission Owner qualification criteria that must be met before a potential transmission owner can participate in SPP's Competitive Solicitation Process described in Sections 2.2 and 2.3 above. The Transmission Owner qualification criteria would apply only to those entities seeking to construct, own, and operate transmission projects that are subject to the SPP Competitive Solicitation Process.

The general basis upon which the SPCTF make its recommendation for Transmission Owner qualification criteria is the existing process outlined in Attachment O § VI.6 of the SPP OATT. These are:

**(1) Threshold eligibility criteria:** The recommended threshold eligibility criteria would include, at a minimum, some level of proof by an Applicant Transmission Owner (“ATO”) that the ATO has the legal authority under state law to construct facilities within a state in which a project will be built and some level of assurance that the ATO is or will be a member of SPP.

The SPCTF recommends that the SPCTF develop the threshold criteria by June 30, 2012.

[(2) is Omitted as it was assigned to SPP's Finance Committee]

**(3) Managerial criteria:** The recommended managerial eligibility criteria would require an ATO to demonstrate certain managerial expertise.

The SPCTF recommends that the SPCTF develop the managerial expertise criteria by June 30, 2012.

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#### **4.1 Recommended Change to SPP's Membership Agreement**

The SPCTF recommends that the following sections of SPP's Membership Agreement be amended to remove the Federal ROFR, as stated below.

Section 3.3 of the SPP Membership Agreement, which governs construction of transmission facilities in SPP, contains Federal ROFR language that will need to be modified to comply with Order 1000. Specifically, Section 3.3(b) of the SPP Membership Agreement indicates:

After a new transmission project has received the required approvals and been approved by

SPP, SPP will direct the appropriate Transmission Owner(s) to begin implementation of the project. If the project forms a connection between the facilities of a single Transmission Owner, that Transmission Owner will be designated to provide the new facilities. If the project forms a connection between facilities owned by multiple parties, all parties will be designated to provide the respective new facilities. The parties will agree among themselves as to how much of the project will be provided by each entity. If agreement cannot be reached, SPP will facilitate the ownership determination process.

Thus, under the language of Section 3.3(b), SPP is obligated to designate an incumbent Transmission Owner to construct new transmission facilities (i.e., the owner of existing facilities to which the new facility will connect).

Furthermore, Section 3.3(c) of the SPP Membership Agreement states:

A designated provider for a project can elect to arrange for a new entity or another Transmission Owner to build and/or own the project in its place. If the designated provider(s) does not or cannot agree to implement the project in a timely manner, SPP will solicit and evaluate proposals for the project from other entities and select a replacement.

This language provides an option for the designated Transmission Owner to assign the project to another entity or to decline to “implement the project” (i.e., “refuse” to build the project).

When read together, Sections 3.3(b) and 3.3(c) provide incumbent Transmission Owners a Federal ROFR over transmission projects approved for construction by SPP. SPP is required to assign the construction obligations for new transmission facilities to incumbent Transmission Owners that own the existing facilities to which a new transmission facility will interconnect. Once a new transmission facility is assigned, the designated Transmission Owner(s) have the option either to construct

the project, assign the project to another entity, or decline to construct the project. As a result, the SPCTF recommends that SPP modify these sections to comply with Order 1000 in a manner that is consistent with this Report.

The SPCTF will provide language to the Corporate Governance Committee (“CGC”) by April 30, 2012.<sup>3</sup>

As tasked above, Section I of this report contains the SPCTF’s recommendations as to what Transmission Owner Selection Criteria should be used for SPP’s proposed Competitive Solicitation Process and Section II contains the SPCTF’s recommendation as to what Transmission Owner Qualification Criteria and Transmission Owner Managerial experience criteria should be used by SPP.

Additionally, since the SPP Board of Director’s approval of the SPCTF’s First Report, FERC Issued Order 1000-A on May 17, 2012. In Order 1000-A, FERC denied all rehearing request to Order 1000 but did provide clarification to Order 1000. As a result, Section III of this report provides additional recommendations from the SPCTF in part based upon clarifications provided by FERC in Order 1000-A.

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<sup>3</sup> The SPCTF previously provided the reference language to the CGC, therefore, it is not included within in this report.

## **RECOMMENDATIONS OF THE SPCTF ON ORDER 1000**

- I. Recommendation as to What Transmission Owner Selection Criteria SPP Should Use.**
- II. Recommendation as to What Owner Qualification Criteria SPP Should Establish for Applicant Transmission Owners.**
- III. Additional Recommendations including Recommendations on the Mobile-Sierra Doctrine and Changes to the Membership Agreement to Acknowledge the Competitive Solicitation Process.**

## **SECTION I:**

### **Recommendation as to the Transmission Owner Selection Criteria to be used in SPP's Competitive Solicitation Process.**

#### **1.1. Recommended Transmission Owner Selection Criteria**

The SPCTF recommends that SPP use the Transmission Owner Selection Criteria in an SPP Competitive Solicitation Process as detailed in Attachment A to this Report.



## SECTION II:

### Recommendation as to Transmission Owner Qualification Criteria

**ORDER 1000 REQUIREMENT:** Transmission Owner Qualification Criteria: *Order 1000 requires each public utility transmission provider to revise its OATT to demonstrate that the regional transmission planning process in which it participates has established appropriate qualification criteria for determining an entity's eligibility to propose a transmission project for selection in the regional transmission plan for purposes of cost allocation, whether that entity is an incumbent transmission provider<sup>4</sup> or a non-incumbent transmission developer. These criteria must not be unduly discriminatory or preferential.<sup>5</sup> [P. 323] The qualification criteria must provide each potential transmission developer the opportunity to demonstrate that it has the necessary financial resources and technical expertise to develop, construct, own, operate and maintain transmission facilities.<sup>6</sup> [P. 323] Within these general parameters, FERC leaves it to each region to develop qualification criteria that are workable for the region, including procedures for timely notifying transmission developers of whether they satisfy the region's qualification criteria and opportunities to mitigate any deficiencies. [P. 324]*

### SPCTF on Order 1000 Recommendation on Transmission Owner Qualifications

#### 2.1 Recommended Transmission Owner Qualification Criteria

The SPCTF recommends that SPP establish the following Transmission Owner Qualification Criteria that will apply to any entity – incumbent or non-incumbent -- that seeks to participate in SPP's Transmission Owner Selection Process for transmission facilities for which a Transmission Owner does not possess a right of first refusal. The entity must satisfy all Transmission Owner Qualification Criteria prior to being eligible to participate in the Transmission Owner Selection Process.

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<sup>4</sup> The qualification criteria should allow for the possibility that an existing public utility transmission provider already satisfies the criteria and should allow any transmission developer the opportunity to remedy any deficiency. [P. 324]

<sup>5</sup> The criteria are intended to apply only to entities that propose transmission projects and intend to develop the proposed transmission project if selected. Stakeholders that do not intend to develop transmission projects may continue to propose transmission projects for consideration in the regional transmission plan without being required to demonstrate compliance with the criteria. [n.304]

<sup>6</sup> Nothing in the qualifications criteria requirement of Order 1000 is intended to change any existing RTO procedure or practice regarding the operation of existing transmission facilities. [n.303]

Any Application received by SPP from an ATO must contain information necessary to allow SPP to determine whether or not the ATO meets the requirements to be a QTO in SPP.

**(1) Threshold Membership Criteria:**

**SPP Membership:** An Application from an ATO must provide a showing that the ATO is a SPP Member or is willing to sign the SPP Membership Agreement if the ATO is selected as part of SPP's Transmission Owner Selection Process.

**(2) Financial Qualification Criteria:** [Financial Qualification Criteria is being developed by the Finance Committee. As a result, the Financial Criteria are not addressed in this report].

**(3) Managerial Qualification Criteria:**

**Managerial Expertise:** An Application from an ATO must include a showing that the ATO has expertise to construct, own, and operate electric transmission facilities. Expertise to construct, own, and operate electric transmission facilities includes:

- Transmission Project Construction Expertise: engineering, permitting, environmental, procurement, project management, construction, commissioning, technology content,; demonstration of past transmission construction experience; equipment acquisition process; description of applicable right-of-way and real estate acquisition process; description of routing process; description of permitting processes; eminent domain status; process for obtaining easements; surveying responsibility.
- Safety Qualifications and Expertise: internal safety program, contractor safety program, safety performance record (program execution).
- Operations Expertise: demonstration of control center operations (staffing, etc.), demonstration of NERC compliance process and compliance history, demonstration of registration or ability to register for compliance with applicable NERC Reliability Standards, storm/outage response and restoration plan, past reliability performance, statement of which entity will be operating and maintaining completed transmission facilities, staffing, equipment, and crew training.
- Maintenance Qualifications and Expertise: staffing, maintenance plans, equipment, crew training, record of maintenance performance, maintenance expertise, NERC compliance process and history.
- Ability to comply with Good Utility Practice, SPP Criteria, industry standards, and applicable local, state, and federal requirements.

In order for an ATO to become a QTO, the ATO must provide documentation regarding the ATO's satisfaction of the Managerial Qualification Criteria to SPP in advance of the initiation of the next Transmission Owner Selection Process.<sup>7</sup> Specifically, the ATO should provide this documentation as a part of the ATO's Application by June 30 of the preceding year. This will provide adequate time for the ATO to correct deficiencies, if any, and become a QTO to participate in SPP's next Transmission Owner Selection Process.

An ATO can demonstrate that it meets SPP's managerial criteria by demonstrating that the ATO:

- As an entity has the necessary managerial expertise to meet SPP's managerial criteria;
- Is affiliated or has a legal relationship with entities that collectively meet SPP's managerial criteria and has made arrangements with such entities to perform the functions for which the entity deemed to satisfy the qualification criteria if the ATO is ultimately selected to construct a transmission project; or
- Has contracts with entities that enable the ATO to meet SPP's managerial criteria and that the entities will be contractually obligated to perform the functions for which it was deemed to satisfy the qualification criteria if the ATO is ultimately selected to construct a transmission project.

#### **(4) Posting of Applications**

**Posting an Application from an ATO and Notice:** Applications from an ATO will be posted on the SPP website upon receipt by SPP, subject to any applicable confidentiality protections.

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<sup>7</sup> **Evaluation of Managerial Expertise:** SPP can evaluate an ATO's managerial criteria internally or by hiring a firm with expertise to evaluate the managerial experience.

## SECTION III:

### Additional Recommendations

#### 3.1. Recommendation related to the *Mobile-Sierra* Doctrine

In general, the *Mobile-Sierra* doctrine indicates that rates set by a freely negotiated wholesale energy contract are presumed to be just and reasonable. This presumption can only be overcome if FERC concludes that the contract “seriously harms the public interest.” Recent U.S. Supreme Court cases have indicated that the *Mobile-Sierra* doctrine applies both to FERC and third-parties, not just to the contracting parties.

In Order 1000, FERC found that the record in the generic rulemaking proceeding was not sufficient to address arguments that specific contracts are protected by the *Mobile-Sierra* doctrine and that FERC did not make the requisite showing to require modification of such contracts. As a result FERC determined to address such arguments on a case-by-case basis in the compliance filing proceedings.<sup>8</sup> Additionally, in Order 1000-A FERC clarifies, that parties seeking to assert *Mobile-Sierra* must also submit tariff/agreement revisions in their compliance filings to comply with Orders 1000 and 1000-A, which FERC will review only after addressing the *Mobile-Sierra* arguments.<sup>9</sup>

As a result, if *Mobile-Sierra* is asserted as a part of an Order 1000 compliance filing, FERC will first determine, based on a more complete record, whether the agreement is protected by *Mobile-Sierra*.<sup>10</sup> If the agreement is protected by *Mobile-Sierra*, FERC will then determine whether it has met the applicable standard of review to enable it to require revisions to the agreement to comply with Order 1000.<sup>11</sup>

Further, if the agreement is protected by *Mobile-Sierra* and FERC cannot meet the applicable standard of review, it will not consider the revisions submitted in the compliance filing.<sup>12</sup> However, if FERC determines that the agreement is not protected, or if FERC determines that the agreement is protected but that FERC has met the standard, then FERC will consider whether the compliance filing revisions satisfy the requirements of Order 1000.<sup>13</sup>

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<sup>8</sup> Order 1000 at P 292.

<sup>9</sup> Order 1000-A at P 389.

<sup>10</sup> Id.

<sup>11</sup> Id.

<sup>12</sup> Id.

<sup>13</sup> Id.

As a result of the language in Order 1000-A, the SPCTF recommends that SPP include as a part of its compliance filing for Order 1000 arguments that the federal Right of First Refusal contained in SPP's Membership Agreement is protected under the *Mobile-Sierra* Doctrine.

### **3.2. Recommendation of Changes to SPP's Bylaws to Acknowledge the Competitive Solicitation Process.**

#### **Members Committee Involvement in Transmission Owner Selection Process.**

Under the proposed SPP Transmission Owner Selection Process, the SPP Board of Directors will review the recommendations of the Industry Expert Panels ("IEPs") and select the Transmission Owner to construct each new transmission facility that is part of the Transmission Owner Selection Process. To ensure that potential competitors are not involved in selecting Transmission Owners as part of the Transmission Owner Selection Process, the SPCTF recommends that the Members Committee not be involved in the Board of Directors' consideration of IEP recommendations. Excluding the Members Committee from this process, however, may require revisions to the SPP Bylaws to clarify that the Members Committee will not be involved in the Transmission Owner Selection Process.

#### **Background**

Section 5.1 of the SPP Bylaws requires:

The Members Committee shall work with the Board of Directors to manage and direct the general business of SPP. Its duties shall include, but are not limited to the following:

- (a) Provide individual and collective input to the Board of Directors, including but not limited to a straw vote from the Members Committee representatives as an indication of the level of consensus of among Members, on all actions pending before the Board of Directors. (*emphasis added*)

Therefore, under the existing Bylaws, the Members Committee would be involved in the Board of Directors' decision-making in the Transmission Owner Selection Process. While the Bylaws provide for the Board of Directors to meet in executive session, such sessions are held "to safeguard confidentiality of sensitive information regarding employee, financial, or legal matters" and not specifically to address the Transmission Owner Selection Process.<sup>14</sup> Additionally, an executive session of the Board of Directors may not allow for sufficient transparency in the Transmission Owner Selection Process, and SPCTF's intent is not to have the decision made in private, but instead to ensure

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<sup>14</sup> See SPP Bylaws § 4.6.5.

that potential competitors are not involved in the Transmission Owner Selection Process.

### **SPCTF Recommendation**

Therefore, to clarify that the Members Committee will not be involved in the Transmission Owner Selection Process, the SPCTF recommends that Section 5.1 of the SPP Bylaws be amended to specify that the Members Committee will not provide input or conduct a straw vote related to the Board of Directors' decisions regarding the Transmission Owner Selection Process.

The CGC has jurisdiction over changes to the Bylaws. Additionally, Section 10 of the Bylaws requires that changes to Section 5, including Section 5.1, be subject to a vote by the SPP Membership. Therefore, approval by the CGC and a vote of the Membership will be required to adopt this change.